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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1466.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents McElroy et al. ("Respondents") raise three basic points in their brief in opposition to Petitioner's petition for writ of certiorari:

a. Whether Terminal Railroad of St. Louis ("TRRA") has the statutory right to enter into agreement with the duly authorized bargaining agent of its locomotive engineers, the Brotherhood of Locomotive Engineers ("BLE"), concerning the manner of representation at pre-National Railway Adjustment Board ("NRAB") grievance proceedings.

b. That no conflict exists between the decision of the Seventh Circuit in this case and decisions of the Eighth Circuit on the same subject.

c. That Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C. A., Section 152 Eleventh (c)) grants Respondents the right to belong to the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), and the Agreement between TRRA and BLE restricting representation of engineers at pre-NRAB grievance proceedings to the duly elected bargaining representative of the engineers interferes and coerces respondents in their choice of representative, contrary to Section 2 Third of the Railway Labor Act (45 U. S. C. A., Section 152 Third).

We shall show that those contentions are without substance, but even if it were otherwise, that does not detract from the compelling need for review of the decision below by this Court. Respondents have not challenged Petitioner's point that the Court below by requiring TRRA to confer and adjust the grievances of its engineer employees with a rival minority union, BLF&E, will greatly contribute to "confusion in administration" of the collective agreements and "introduce that strife between rival unions which was one of the chief purposes of the Act to prevent." **Douds v. Local 1250**, 173 F. 2d 764, 771 (C. A. 2nd, 1949).

1. TRRA and BLE have entered into an agreement relating to representation of engineers at pre-NRAB grievance proceedings. Without restricting the employee's individual right to represent himself on company level grievance matters, TRRA and BLE have provided that the BLE, as duly elected bargaining representative of TRRA's engineers, shall be the representative of the engineers at company property level grievance discussions.

Respondents argue that TRRA has no statutory right to enter into such an agreement. In the alternative, Re-

spondents argue that they have a right to select whomever they choose as their representative at company level discussions. Their argument is not correct.

First, TRRA needs no statutory authority to enter into agreement with BLE concerning representation of employees at pre-NRAB grievance proceedings.

Second, Respondents have no statutory rights relating to the selection of representatives at pre-NRAB level grievance discussions.

Unless the Railway Labor Act specifically gives the Respondents the right to choose their representatives at pre-NRAB grievance discussions, no such right exists. **General Committee, BLE v. Missouri-Kansas-Texas Railroad Co.**, 320 U. S. 323, 330 (1943).

In the **M-K-T** case, the Court stated, l. c. 337:

> "The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the Courts should be implied."

There is simply no statutory authority which gives respondents the right of choice of representation at the property level grievance proceedings. The Seventh Circuit itself recognized that fact in **Edwards v. St. Louis-San Francisco Railway Co.**, 361 F. 2d 946 (C. A. 7th, 1966), where it said, l. c. 953, 954:

"The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property.

* * * * * * * *

"The Federal Courts are not guarantors of any rights either of labor or management at the initial hearing, either by force of the Constitution or the Railway Labor Act, for, as we have said, at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them."

The Seventh Circuit in the **Edwards** case further emphasized that the Railway Labor Act does not "regulate the grievance procedures at the company level, procedures heretofore left to the company and the employees to devise for themselves" (l. c. 955).

TRRA and BLE, in making contract relating to representation at pre-NRAB grievance proceedings, have merely followed the bargaining process to which they have a right. Respondents have no right to interfere with the rights exerted by TRRA.

Respondents rely on **Elgin, Joliet & Eastern Ry. Co. v. Burley**, 325 U. S. 711 (1945), as chief support for their position that the action by TRRA and BLE entering into the agreement of November 15, 1965 is in some way unlawful and violates the Railway Labor Act. Respondents suggest that the **Burley** case stands for individual rights of railroad employees. **Burley** does indeed hold that the individual employee has certain rights under the Railway Labor Act and that the duly authorized bargaining agent cannot strip the individual of his guaranteed rights. However, the joint action of TRRA and BLE, as pointed out above, has not deprived the individual employee of

any right granted to him as an individual by the Railway Labor Act. In short, the **Burley** case has no application to the case at hand. It simply stands for the proposition that a collective bargaining agent may not settle accrued claims of the individual employee without the employee's approval or at least in the face of the employee's opposition to such settlement of the claim. The **Burley** case, particularly in the opinion on reargument at 327 U. S. 661, says that if the employee does not want the collective bargaining agent to handle a claim for him, then the collective bargaining agent will not be permitted to settle such claim. **Burley** presents a far different issue than exists in this case, for here, the employer and the collective bargaining agent have said that if the employee wishes to have representation in the matter of the handling of certain claims, then he shall have the BLE represent him. In the case at hand, if the individual employee does not wish to have representation by the BLE in the handling of claims, there is no compulsion on his part to have the BLE handle his claims, and there is certainly no restriction on his choice to represent himself in the matter of handling claims at the pre-NRAB level.

The only right granted to Respondents under the Railway Labor Act concerning representation at pre-Board level grievance and time claim proceedings concerns the right of the individual to represent himself. There has been no invasion of this right.

2. Respondents assert that the Seventh Circuit's decision in this case, which would allow a minority union to represent employees at company level discussions, does not conflict with decisions of other circuits.

The matter of such conflict between circuits was detailed in TRRA's Petition for Writ of Certiorari. The existence of such conflict is obvious. In **Butler v. Thompson**, 192 F. 2d 831 (C. A. 8th, 1951), the Eighth Circuit,

in ruling on pre-NRAB grievance proceedings agreement between a carrier and bargaining agent, stated l. c. 833:

> "The statute recognizes a distinction between proceedings on the company level and those before the Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an exacting legal contract controls, whereas the procedure before the Board is governed by the statute."

In **Brooks v. Chicago, R. I. & P. R. Co.**, 177 F. 2d 385 (C. A. 8th, 1949), the Eighth Circuit stated at page 391:

> "The Railway Labor Act does not empower courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ."

The Second, Fifth and Eighth Circuits have also positively held that a company is not required to discuss grievance procedures with a minority union at company level grievance proceedings under the National Labor Relations Act. **National Labor Relations Board v. Posner**, 342 F. 2d 826, 829 (C. A. 2nd, 1965); **Hughes Tool Co. v. National Labor Relations Board**, 147 F. 2d 69 (C. A. 5th, 1945); **National Labor Relations Board v. Blades Mfg. Co.**, 344 F. 2d 998, 1004 (C. A. 8th, 1965).

Opposed to the decisions of the Second, Fifth and Eighth Circuits, and particularly the Eighth Circuit, which have upheld agreements similar to that which TRRA and BLE have entered into concerning representation at company level grievance discussions, is the decision of the Seventh Circuit in this case which says such agreement is improper.

Since TRRA's operations are divided between Illinois and Missouri and are therefore included within the Seventh and Eighth Circuits, the conflict in decisions be-

tween the circuits genuinely affects TRRA. It is therefore most important that the Supreme Court grant TRRA's petition for writ of certiorari so that the conflict between circuits may be resolved.

3. Respondents seem to imply in their reply brief that TRRA has no right to petition for writ of certiorari in this case; that TRRA is by some means guilty of coercing respondents in their choice of bargaining agents, which would be improper under Section 2 Eleventh (c) of the Railway Labor Act (45 U. S. C. A., Section 152 Eleventh (c)). This, of course, cannot be true, as the agreement between TRRA and BLE is but part of the collective bargaining procedure between the carrier and the duly authorized bargaining agent for TRRA's engineers. The agreement between TRRA and BLE concerning the handling of grievances at pre-NRAB grievance discussions has nothing to do with the selection of the bargaining agent and is a matter only between the bargaining agent and the carrier.

Respondents also claim to be astonished at TRRA's failure to refer to Section 2 Eleventh (c) of the Railway Labor Act in its Petition. The simple fact is that 2 Eleventh (c) has no application to this case. Section 2 Eleventh (c) has a very limited purpose—"to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily exchanges crafts." **Pennsylvania R. Co. v. Rychlik,** 352 U. S. 480, 488 (1957).

BLE is the duly elected bargaining representative of engineers employed by TRRA. The agreement between TRRA and BLE concerning pre-NRAB grievance proceedings discussions has nothing to do with the selection of the bargaining agent and does not alter the fact that respondents, as members of BLF&E, do not have to change unions when working as engineers for TRRA.

Section 2 Eleventh (c) of the Railway Labor Act, which eliminates compulsory dual unionism, is simply not concerned with this case.

CONCLUSION.

For the reasons contained in this reply brief and as set forth in TRRA's petition to this Court for writ of certiorari, writ of certiorari should be granted.

Respectfully submitted,

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